

Award
NASD Dispute Resolution, Inc.

In the Matter of the Arbitration Between:

Mountain States Neonatology Retirement Plan (Claimant) vs. U.S. Bancorp Piper Jaffray d/b/a Piper Jaffray and Mark J. Fredback (Respondents).

Case Number: 99-01113

Hearing Site: Salt Lake City, Utah.

REPRESENTATION OF PARTIES

For Claimant: Scot M. Ludwig, Esq.
 Law Offices of Scot M. Ludwig
 Boise, Idaho.

For Respondents: Mark S. Reed, Esq.
 U.S. Bancorp Piper Jaffray
 Minneapolis, Minnesota.

CASE INFORMATION

Statement of Claim filed on or about: March 10, 1999.

Claimant signed the Uniform Submission Agreement: March 5, 1999.

Respondents Statement of Answer was filed on or about: July 9, 1999.

U.S. Bancorp Piper Jaffray Inc. executed the Uniform Submission Agreement: July 9, 1999.

Mark Fredback signed the Uniform Submission Agreement: March 12, 1999.

CASE SUMMARY

Claimants asserted the following causes of action: unauthorized trading without prior written authorization (lack of discretionary agreement); breach of fiduciary duty; breach of contract; fraud; negligent supervision; failure to maintain a system of supervision and/or inspection to achieve compliance with applicable securities laws and regulations, including the failure to establish written procedures.

The Claimant alleges that Respondent Fredback took complete control and decision making of Claimant's retirement account. Claimant alleges that Respondent Fredback made unauthorized trades in the many speculative stocks for his retirement account which adversely affected the performance of the account.

Respondents U.S. Bancorp Piper Jaffray and Mr. Fredback deny the allegations within the Statement of Claim and further submit that it presents far less than a complete picture of the facts and circumstances surrounding Dr. Sell's account relationship and the transactions at issue

because consideration of the omitted information will establish that Claimants are not entitled to recover in this proceeding. Noticeably absent from the Statement of Claim are any allegations from which it can properly be determined that: 1) Dr. Sell had substantial investment experience and an extensive account relationship throughout which he consistently pursued growth as the primary investment objective in his pension and profit sharing account through a value oriented investment strategy; 2) Dr. Sell's account relationship with Piper Jaffray spanned over a decade and included at least nine (9) different accounts in which he was actively involved; 3) Dr. Sell and his wife had substantial financial resources including over \$1.5 in investment holdings and a combined annual income in excess of \$1 million; 4) Claimants did not disclose Dr. Sell's decision to terminate his account relationship with an independent money manager introduced by Mr. Fredback because that arrangement did not permit him the involvement and opportunity for input he expected with respect to his investments; and 6) Dr. Sell's pension and profit sharing accounts were maintained with Respondents for over a decade and generated substantial returns notwithstanding the decline in value experienced in the last few months of this account relationship *when both domestic and international capital markets declined substantially.*

U.S. Bancorp Piper Jaffray and Mr. Fredback assert the following affirmative defenses in further response to the claims in this arbitration proceeding: 1) Claimants are barred from relief by applicable statutes of limitation; 2) Claimants are barred from relief by the doctrines of waiver, estoppel, ratification and laches; 3) Claimants are barred from relief because the Statement of Claim fails to state a claim upon which relief can be granted as the activity in Dr. Sell's account was consistent in all material respects with his objectives, investment experience and financial situation; 4) Claimants are barred from relief because Dr. Sell directed, authorized or approved the transactions underlying his purported claims; 5) Claimants are barred from relief because any losses sustained by Dr. Sell resulted from his own acts, omissions, negligence or failure to exercise ordinary care in the handling of his accounts; 6) Claimants are barred from relief because any losses sustained by Dr. Sell were not the result of a failure by U.S. Bancorp Piper Jaffray to implement, maintain, and administer adequate supervisory procedures; 7) Claimants are barred from relief because any losses sustained by Dr. Sell resulted from factors outside Respondents' control or intervening causes including, without limitation, market events and changes in the business prospects of the issuers of the securities he owned; 8) Claimants are barred from relief because Dr. Sell understood that his securities would fluctuate in value and assumed the risk they might decline in value; 9) Claimants are barred from relief because Dr. Sell failed to mitigate his alleged damages; and 10) Claimants are barred from relief because equity does not permit Dr. Sell, with the benefit of hindsight, to retain the substantial profits he realized in his accounts over several years from pursuing growth through a value strategy, but also turn back the clock and hold Respondents responsible for the general market decline that occurred in the last few months of his U.S. Bancorp Piper Jaffray account relationship.

U.S. Bancorp Piper Jaffray and Mr. Fredback respectfully submit that consideration of all the facts and circumstances surrounding Dr. Sell's pension and profit sharing account establishes that Claimants are not entitled to recover in this proceeding. In the first instance, Dr. Sell was well

suited to his chosen investment strategy in light of his objectives, investment experience and financial situation. Secondly, Dr. Sell approved of and successfully pursued his growth objective and value strategy for several years and achieved substantial returns. Thirdly, Dr. Sell specifically authorized and approved each transaction entered for his account in pursuit of that strategy. Claimants have not and cannot establish that Respondents engaged in any wrongdoing or that they are entitled to any recovery in this arbitration proceeding. The evidence will also show that any losses Dr. Sell sustained resulted from factors that were either unforeseeable or beyond Respondents' control including, without limitation, the substantial decline that occurred generally in the securities markets in the second and third quarter of 1998. Therefore, U.S. Bancorp Piper Jaffray and Mr. Fredback submit that the Statement of Claim and all claims asserted therein should be dismissed in their entirety with prejudice and they be awarded their reasonable attorneys' fees, costs and expenses incurred in defending this matter.

RELIEF REQUESTED

Claimants requested:

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|--------------------------|--|
| Damages in the amount of | \$300,949 based on an immediate liquidation damage theory; |
| or in the alternative | \$353,318 based on the actual liquidation theory. |
| Attorneys' Fees | Unspecified |
| Expert Fees | Unspecified |
| Costs | Unspecified |

Respondents requested:

| | |
|--|---------------------------------------|
| Attorneys' Fees | Unspecified |
| Costs | Unspecified |
| Other Monetary/Non-Monetary Relief if any: | Expungement of Fredback's CRD record. |

OTHER ISSUES CONSIDERED AND DECIDED

The parties have agreed that the Award in this matter may be executed in counterpart copies or that a handwritten, signed Award may be entered.

AWARD

After considering the pleadings, the testimony and evidence presented at the hearing, the Panel has decided in full and final resolution of the issues submitted for determination as follows:

1. Each and every claim asserted in the Statement of Claim is denied and dismissed with

prejudice;

2. Respondent's request for expungement of Mark Fredback's CRD record is denied;
3. Each side to bear their own costs and expenses, including attorneys' fees.

FEES

Pursuant to the Code, the following fees are assessed:

Filing Fees

NASD Dispute Resolution, Inc. will retain or collect the non-refundable filing fees for each claim:

| | |
|--------------------------|---------|
| Initial claim filing fee | = \$200 |
|--------------------------|---------|

Member Fees

Member fees are assessed to each member firm that is a party in these proceedings or to the member firm(s) that employed the associated person(s) at the time of the event(s) giving rise to the dispute. In this matter U.S. Bancorp Piper Jaffray is the member firm.

| | |
|----------------------------|------------------|
| Member surcharge | = \$1,500 |
| Pre-hearing process fee | = \$ 600 |
| <u>Hearing process fee</u> | <u>= \$2,500</u> |
| Total Member Fees | = \$4,600 |

Forum Fees and Assessments

The Arbitrator Panel assesses forum fees for each hearing session conducted. A hearing session is any meeting between the parties and the arbitrator(s), including a pre-hearing conference with the arbitrator(s), that lasts four (4) hours or less. Fees associated with these proceedings are:

| | |
|---|------------|
| Two (2) Pre-hearing session(s) with Panel x \$750 | = \$1,500 |
| Pre-hearing conference(s): | |
| December 15, 1999 | 1 session |
| August 1, 2000 | 1 session |
| Four (4) Hearing sessions x \$750 | = \$3,000 |
| Hearing Date(s): | |
| November 29, 2000 | 2 sessions |
| November 30, 2000 | 2 sessions |
| Total Forum Fees | = \$4,500 |

1. The Panel has assessed \$1,875 of the forum fees to Claimants.
2. The Panel has assessed \$1,875 of the forum fees to U.S. Bancorp Piper Jaffray.

3. The Panel waived the \$750 forum fee associated with the August 1, 2000 pre-hearing conference.

Fee Summary

1. Claimant is solely liable for:

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|---|------------------|
| Initial Filing Fee | = \$ 200 |
| <u>Forum Fees</u> | <u>= \$1,875</u> |
| Total Fees | = \$2,075 |
| <u>Less payments</u> | <u>= \$ 950</u> |
| Balance Due NASD Dispute Resolution, Inc. | = \$1,125 |

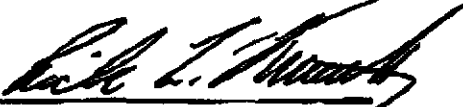
2. U.S. Piper Jaffray Inc. is solely liable for:

| | |
|---|------------------|
| Member Fees | = \$4,600 |
| <u>Forum Fees</u> | <u>= \$1,875</u> |
| Total Fees | = \$6,475 |
| <u>Less payments</u> | <u>= \$4,600</u> |
| Balance Due NASD Dispute Resolution, Inc. | = \$1,875 |

All balances are due and payable to NASD Dispute Resolution, Inc.

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Concurring Arbitrators' Signature(s)


Rick L. Knuth
Public Arbitrator, Presiding Chair

1/4/01
Signature Date

Ross W. Cannon, Esq.
Public Arbitrator

Signature Date

E. Y. Bennion
Industry Arbitrator

Signature Date

Date Served:


JAN 5 2001

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Arbitration No. 99-01113
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Concurring Arbitrators' Signature(s)

Rick L. Knuth
Public Arbitrator, Presiding Chair

Signature Date


Ross W. Cannon, Esq.
Public Arbitrator

Jan 4, 2001
Signature Date

E. Y. Bennion
Industry Arbitrator

Signature Date

Date Served:

JAN 5 2001